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In The

Supreme Court of the United States

No. 79-1128

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KALBUNDE, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA AND THE CROW TRIBE OF INDIANS, MONTANA,

Respondents.

BRIEF OF AMICI CURIAE COEUR D'ALENE TRIBE OF INDIANS AND SPOKANE TRIBE OF INDIANS IN SUPPORT OF RESPONDENTS

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Statement of Interest of Amici Curiae

The Coeur d'Alene Indian Reservation in Idaho and the Spokane Indian Reservation in Washington have navigable bodies of water within the exterior boundaries of their Reservations. The Tribes claim and assert ownership of the bed and banks of these navigable bodies of water, and realize that any future litigation of their claim to such will be decided against the backdrop of this case[1]. These property interests, until the current appeal, were thought to be sacrosanct and in most instances are the subject of special legislation, contracts or governmental course of conduct of many years recognizing these interests legally, civilly and jurisdictionally. It would be unthinkable that a decision at this time could be promulgated by the United States Supreme Court which could have the effect of calling these titles into question.

The primary focus of this brief is to answer the amicus brief of the State of Washington. The Tribes limit their brief to the sole question of who owns the bed and banks of the navigable Big Horn River that flows through the heart of the Crow Indian Reservation in Montana. It is the understanding of the Tribes that other amicus curiae briefs will be filed on the question of Tribal regulation of non-Indian hunting and fishing.

Introduction and Summary of Argument

Prior to the entry of Montana into the Union in 1889, the United States Government had established a reservation for the Crow Tribe of Indians. The reservation was established by a metes and bounds description

[1] At the present time, the Coeur d'Alene Tribe and the Spokane Tribe are litigating their right to compensation for the use of the bed and banks of the navigable waters within their Reservations under 10(a) of the Federal Power Act. Federal Energy Regulatory Commission Project No. 2545.

including all land, therefore, the beds of all bodies of water, contained within that description. By the Organic Act of the Montana Territory, Congress made it clear that the Crow lands were to constitute no part of the Territory of Montana. The subsequent State of Montana disclaimed any right and title to Indian lands within its boundaries, including the Crow Reservation.

Congress recognized the Tribal ownership of the bed and banks of the navigable waters, for in subsequent cessions to the United States government by the Tribe, the United States carefully included and excluded the beds of the same as it suited the needs of the United States at that time. At no time did the United States ever recognize or adhere to any possibility of state ownership of those beds[2].

The State of Montana refuses to accept the existence of Indian ownership of the bed and banks of the navigable bodies of water within Indian Reservations. The State continues to re-litigate the same issues often settled by the Ninth Circuit. The Ninth Circuit line of cases on the issue of ownership of the bed and banks should control.

Montana attempts to convince the Court that *Choctaw Nation v. Oklahoma*, 397 US 620 (1970), involved fee title, and thus was of a significantly different nature from the Crow lands in question. The state fails to recognize that the restricted nature of the Choctaw and Cherokee "fee" is of no significant difference than the restricted trust status of the Crow lands.

If the legal position of the State of Montana is correct and the State of Montana received title to the beds of all the navigable waters on Indian Reservations at the time of

[2] The above is most extensively covered by the Brief of the Respondent Crow Tribe which is being filed simultaneously with this Amicus Brief.

statehood, then, on that date, a sudden phenomenon happened on each reservation. Each was instantly laced and criss-crossed with enclaves of state ownership. Suddenly the state was the owner of the beds of every navigable body of water within Indian Reservations. This title phenomenon occurred not yesterday but on the day of statehood nearly a century ago. If this in fact occurred and we replayed history, we can only speculate about the different story that would be told today about the lease and utilization by the Montana Power Company of the power site of Kerr Dam on the Flathead and the building by the United States of Yellowtail Dam on the Crow Reservation with its condemnation action and statutory taking of the bed of the river.

Finally, the State of Washington, in its amicus brief, equates ownership of the beds of rivers with navigational servitude, stating that if the Tribes held ownership of the bed, then the Tribes would have had the right to exclude non-Indians. In confusing Indian title with Indian rights, Washington fails to realize that the Tribes recognize navigational servitude in the United States — as must the several states.

Washington also argues that as the riparian beds of the Big Horn River passed into non-Indian ownership, the ownership of the bed passed piecemeal into state ownership. Besides being a practically unmanageable concept, the state fails to note that in *Choctaw Nation*, the Tribes had long since lost title to the riparian lands.

I
State of Montana Stubbornly Refuses to Accept Federal Rule of Tribal Property Interests in the Waters and Beds of Streams

Washington's and Montana's briefs dramatize the refusal of States and their attorneys general (reflecting the political opinion of their states) to accept what is from

the Tribes' point of view settled property law in the fields of Indian water rights (Winter's rights) and ownership of the beds and navigable bodies of water.

This intransigence on the part of Montana has resulted in it becoming and remaining a cradle of sorts of Indian law on these two fundamental fields. Montana was the wellspring of Indian water law in the cases of *Winters v. United States*, 207 US 564 (1907) and *Conrad Inv. Co. v. United States*, 161 Fed. 829 (1908).

One would think that with such a clear Supreme Court ruling and Ninth Circuit decisions affirming the extent and nature of tribal water rights, Montana would reconcile itself to them. It has not.

Washington, like Montana, has its own landmark Winters rights cases which seem to settle the law of reserved water rights in favor of the Tribes. *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (Ninth Circuit 1956), Cert. Denied, 352 US 998 (1956); *United States v. Ahtanum Irr. Dist.*, 330 F.2d 897 (Ninth Circuit 1964), Cert. Denied, 381 US 924 (1965); *United States v. Ahtanum Irr. Dist.*, 338 F.2d 307 (Ninth Circuit 1965). Washington does not accept those decisions despite their apparent finality and is presently locked in litigation with several Tribes re-trying the same issues. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. 1978), Aff. Ninth Circuit, August 20, 1980, Civ. No. 79-4297; *United States v. Anderson*, Civ. No. 3643 (E.D. Washington, July 23, 1979); *United States v. Bel Bay Community and Water Association*, Civ. No. 303-7102 (W.D. Washington, filed 1979).

The Tribes and their federal trustee have, all over the west, had to litigate and re-litigate the question of their reserved water rights.

UNITED STATES v. MONTANA
Follows the Same Repetitious Line

As in the Winters rights to the use of water, the Tribes of Montana thought they had early on secured their property rights to the beds of navigable streams.

On one reservation alone, the Flathead, case law evolved that firmly and hopefully for all times established these Tribal property rights to the beds. *Montana Power v. Rochester,* 127 F.2d 189 (1942); *United States v. Pollmann,* 364 F.Supp. 995 (1973); *The Confederated Salish and Kootenai Tribes v. Namen,* 380 F.Supp. 452 (D. Montana, 1974); *The Confederated Salish and Kootenai Tribes v. Namen,* 534 F.2d 1376 (Ninth Circuit, 1976); *The Confederated Salish and Kootenai Tribes v. Namen,* Civ. No. 79-143 (D. Montana, September 20, 1979).[3]

With all respect to the Federal District Court Judge in *United States v. Finch,* 395 F.Supp. 205 (1975), and the current case, he, like his counterparts in other States, has appeared to seek rationales and means to deny established Tribal property rights on waters and stream beds and to set the stage for this recurring appellate process.

In 1975, Judge Battin ruled that this Court's decision in *United States v. Holt State Bank,* 270 US 49 (1926), was controlling rather than the more recent and similar case of *Choctaw.* He stated:

> "I conclude from the above that the treaties involved in this case most closely approximate those in *Holt State Bank* and not those in the *Choctaw Nation.*"

United States v. Finch, supra, at 210.

He also ruled that the title was not held by the United States in trust for the Tribe.

The Ninth Circuit gave the District Court's opinion on title short shrift. *United States v. Finch,* 548 F.2d 822

[3] These cases are discussed in more detail below.

(Ninth Circuit 1976), vacated on other grounds, 433 US 676 (1977). As to the title question of who owned the bed of the river, that Court found that the treaty history of the Crows was more similar to *Choctaw* than to *Holt* and reversed the District Court. It, in fact, found little similarity to *Holt* and a close similarity to *Choctaw*.

Following an excellent summary and analysis of the sequence of treaties and dealings with the Crows, the Court stated:

> "We rule, in the light of the foregoing, that in establishing the Crow Reservation, the United States intended that all lands therein, including the river bed, were to be for the exclusive use of the Tribe."

Id., at 831.

One cannot read this series of cases and not be disturbed that Montana would again litigate this question in the current series. Except for the later dates and different case titles, a casual reader would think it to be the same case.

Again, for the same reasons given in the first decision of *United States v. Finch*, 395 F.Supp. 205 (D. Montana 1975), and ignoring the intervening Ninth Circuit contrary decision of *United States v. Finch*, 548 F.2d 822 (Ninth Circuit 1976), the same district judge held that the State and not the Tribe owned the bed of the river. *United States v. Montana*, 457 F.Supp. 599 (D. Montana 1978). He again cited and discussed *Holt* and *Choctaw*, still liking *Holt* better and again held:

> "The treaties, the evidence, and the arguments presented in this case involving the Crow Indian Reservation, in particular the title to the bed and banks of the Big Horn River, most closely approximate those in the *Holt State Bank* case, *supra*, and not those of the *Choctaw Nation* case . . . such analysis compels a conclusion that the bed and banks of the Big Horn River passed to the State of Montana upon its admis-

sion to the Union."

Id., at 607.

Citing his own decision in *Finch*, he refused to follow the Ninth Circuit decision that had reversed him. He ignored other cases that seemed to contradict him[4]. He did cite the *Finch* appeal history and noting the reversal by the Supreme Court "on other grounds" stated:

> "This court does not feel bound by the circuit's determinations in the *Finch* case, *supra*. The circuit's decision in *United States v. Finch, supra*, may be an indication of how that court would rule if there were an appeal in this case. However, I am confident that the Court of Appeals will find, on their record made here, that the bases for its earlier decision are not supported by the record."

United States v. Montana, 457 F.Supp. 599, n. 1 (D. Montana 1978).

The Ninth Circuit was unmoved. In *United States v. Montana*, 604 F.2d 1162 (Ninth Circuit 1979), the court, after again summarizing the treaty history of the Crows, stated:

> "We have previously considered the status of the title to the banks of the Big Horn River within the exterior boundaries of the Crow Reservation. (Cites Omitted). We held that to the ordinary high water mark the title to the bed and banks of the Big Horn is held by the United States in trust for the Crow Tribe. Although our judgment was vacated by the Supreme Court on grounds not related to the issue of title, we regard our authority in *Finch* as the appli-

[4] Ie., surprisingly he nowhere cites the contrary Flathead cases which were so important in *Choctaw* and originated in his own court. *Montana Power v. Rochester*, 127 F.2d 189 (1942); *United States v. Pollmann*, 364 F.Supp. 995 (1973); *The Confederated Salish and Kootenai Tribes v. Namen*, 380 F.Supp. 452 (D. Montana 1974); *The Confederated Salish and Kootenai Tribes v. Namen*, 534 F.2d 1376 (Ninth Circuit 1976); *The Confederated Salish and Kootenai Tribes v. Namen*, Civ. No. 75-143-M (D. Montana Sept. 20, 1979).

cable authority in this circuit."

Id., at 1166.

That court in its "post script" (Id., at 1172), seems to agree with the writer on the need for clear and final decisions, finalizing questions of title. The Per Curiam on the State's Petition for Rehearing carried this concept forward. To the United States' argument of the need for a uniform national rule "because of the vast amount of lands held in trust for the Indians that it administers", the court said[5] that in the interest of uniformity of title, the "title to the bed and banks of the Big Horn extends to the ordinary high water mark."

The writer, on behalf of the many Tribes with recognized title to the beds of navigable waters within their Reservations, calls on this court to do what the Ninth Circuit attempted, issue a clear, strong, general and unassailable decision, recognizing Tribal title, in words and form that the States of Montana and Washington will understand so that these states will not continue to litigate and re-litigate these same issues.

II
Earlier Flathead Cases Should Control

As discussed above, the refusal of the Montana District Court to cite and follow the legal precedent set in the family of Flathead Tribal cases beginning with *Montana Power Company v. Rochester*, 127 F.2d 189 (Ninth Circuit 1942), is alarming.

This series of cases, litigated in the same courts as the current series, established the property rights of the Confederated Flathead and Kootenai Tribes to the

[5] The court stated thus on the question of whether the property line was at the high water or low water mark.

southern one-half of Flathead Lake and the Flathead River. *Rochester* is significant also in that the litigating parties were Montana Power Company, the Tribal lessee of the power site, and Rochester, a private landowner.

With factual, historical background no stronger than that of the Crows, the Ninth Circuit, in reversing the local federal district court, had no trouble in holding:

> "Whether the ownership was originally in the Indians or in the United States, it is certain that by the treaty the United States undertook to hold title to the reserved area, including the bed of the southerly half of the lake, in trust for the Confederated Tribes."

Id., at 191.

The only real question was whether that title was to the low water mark rather than to the high water mark. The Ninth Circuit dealt with both that question and the question of title in a pointed paragraph as follows:

> "In the circumstances here we do not believe the question whether the Indian patentees took to low water, or only to high, is one of state law. Clearly, the United States in the exercise of its sovereign power had the right to deal with the lands below high water mark as they saw fit. *Shively v. Bowlby, supra, Alaska Pacific Fisheries Co. v. United States,* 248 US 78; *Donnelly v. United States,* 228 US 243; *Taylor v. United States,* Ninth Circ., 44 F.2d 531, 533; and the treaty leaves no room for doubt that the government chose to hold the entire area, submerged lands no less than uplands, in trust for the Indians rather than for the future state to be carved out of the region."

Id.

Thus the Ninth Circuit thought it had settled this title question forever.

Despite *Rochester,* the title and rights of the Flathead Tribes to the bed and banks of the Flathead Lake within

the Reservation have been the subject of a subsequent series of cases. While the decisions in several of these have wandered to and fro on issues of jurisdiction, rights of dockage, etc., all have recognized the Tribal title to the bed.

In *United States v. Pollman*, 364 F.Supp. 995 (D. Montana 1973), the question was whether the Tribes had exclusive control over fishing on the waters. Judge Jameson, citing *Shively*, held that while it was true that the United States generally held title to submerged lands under navigable waters in trust for the future states, in the case of Indian reservations like the Flatheads, under the law cited in *Choctaw* and *Rochester*, which he found controlling, title to the beds was held for and passed to the Tribes.

Identical issues reared their heads in *Confederated Salish and Kootenai Tribes v. Namen*, 380 F.Supp. 452 (D. Montana 1974), with similar parties and lawyers and the same judge. While holding in favor of riparian owners on rights of wharfage and public navigation, the court, citing *Shively*, again stated that title to the bed and banks of the southern half of the Flathead Lake below high water mark is held by the United States in trust for the Tribes.

On appeal, the Ninth Circuit affirmed on all points. *The Confederated Salish and Kootenai Tribes v. Namen*, 534 F.2d 1376 (Ninth Circuit 1976). On return of the case for additional proceedings to establish the reasonable needs and rights of Namen and the City of Polson for wharfage, one would think that the litigants would have recognized the Tribal title to the bed. They continued to question it and on retrial of the consolidated cases of *Confederated Salish and Kootenai Tribes v. Namen* and *City of Polson v. Confederated Salish and Kootenai Tribes*, Civ. No. 2343 and 75-143, September 20, 1979 (restated again in opinion of April 8, 1980), the Federal District Court for Montana again held that the United

States held title to the bed and banks of the southern half of the lake in trust for the Tribe, citing its previous holdings in *Rochester* and *United States v. Montana* as controlling.

Judge Jameson then proceeded with a scholarly discussion and analysis of *Shively, Rochester, Holt* and *Choctaw Nation* and, on the question of title, concluded:

> "While the treaty provisions construed in *Choctaw* differ somewhat from the treaty involved in this case, I find nothing in *Choctaw* which would justify a departure from the holding in *Rochester, Namen* I, and other cases which followed *Rochester. Rochester* is the law of the circuit and is controlling. . . . The United States holds title to the bed and banks below that point [the high water mark] in trust for the Tribes."

Id.

The building, in the early 1930's, of Kerr Dam by the Montana Power Company under lease from the Tribes just below the outlet of Flathead Lake and its operation to the present day utilizing the storage capacity of the lake as its reservoir has been a prime economic asset of the Tribes and a rich repository of law to the present day. Reams could be written summarizing the various FPC, Department of Interior, Congressional, Court of Claims, and appeal courts considerations, reviews and lawsuits regarding the lease of the Kerr Dam site from The Confederated Salish and Kootenai Tribes (Flatheads) on the Flathead Reservation in western Montana. The resulting cases before the courts of the United States were as follows: *Confederated Salish and Kootenai Tribes v. United States,* 181 Ct. Cl. 739 (1967); *Confederated Salish and Kootenai Tribes v. United States,* 417 F.2d 1340 (Ct. 1969); *Confederated Salish and Kootenai Tribes v. United States,* 467 F.2d 1315 (Ct. Cl. 1972); *Confederated Salish and Kootenai Tribes v. Vulles,* 437 F.2d 177

(Ninth Circuit 1971); *Montana Power v. FPC*, 445 F2.d 739 (DC Circuit, 1970) Cert. Denied 400 US 1013; *Montana Power v. FPC*, 459 F.2d 863 (DC Circuit, 1972).

All these cases assumed and did not question the title of the Tribes to the bed of the Flathead River at the power site and to the river and one-half of the lake that constitutes the reservoir. The legal questions involve the extent and rights of the Tribe to reasonable compensation from its private lessee.

It is inconceivable that, after decades of governmental and contractual recognition of the Tribes' title, the court would in this current case, do anything that could jeopardize that Tribal title and right.

A similar story could be told of several other power sites on reservation lands where the title and right of the Tribes involved are little, if any, different than that of the Crows in this case.

III

"Fee" Ownership of Choctaw and Cherokee Reservations, as provided for by Treaty, is not a Sufficient Basis to Distinguish CHOCTAW v. OKLAHOMA From the Facts of this Case

The petitioners attempt to distinguish the holding of *Choctaw Nation v. Oklahoma, supra*, from the facts of this case by asserting that since the Reservations in that case were given by fee title, a crucial distinction can be made from the Crow lands in this case. (See Pet. Brief, Page 21 et seq.) Petitioners seemingly do not comprehend the restricted fee status that the Choctaw and Cherokee Tribes received.

In speaking of the restricted status of the land of the five civilized tribes, this Court stated:

> "Restricted Indian land is property in which the United States has an interest. *'This national interest*

is not to be expressed in terms of property, or to be limited to the assertion of rights incidental to the ownership of a reversion or the holding of a technical title in trust.'"

United States v. Hellard, 322 US 363, 366 (1944).

This court went on to state that the United States was a necessary party and had an interest in the partition of lands of the five civilized tribes "as it would . . . if the fee were in the United States." Id.

This court also recognized that fee title status of Indian lands is the practical equivalent of lands held in trust for the Tribes. Speaking of the Pueblo title (held in fee simple) to lands subject to restraints on alienation, the court said that such restraints were "essential to the protection of such Indians." *United States v. Candelaria*, 271 US 432 (1926).

It is obvious that the United States government possessed an interest in the Choctaw and Cherokee lands at issue in the *Choctaw Nation* case. The restricted status of those lands is absolutely clear from legislation affecting those lands.

The Treaty of Dancing Rabbit (Act of September 27, 1830, 7 Stat. 333) which established the fee status of the Choctaw lands made it clear that those same lands would revert to the United States if the Tribe ceased to exist as an entity.

The Restraints on the Sale, Lease, etc. of the Choctaw and Cherokee Lands are Almost Identical to Those on Trust Lands

The restricted lands of the Five Civilized Tribes were and continue to be subject to an elaborate framework of statutes regarding restraints on their sale, lease, etc. A long series of intercourse acts,[6] presently embodied in 25

[6] E.G. Act of July 22, 1790, 1 Stat. 137; Act of March 1, 1793, 1 Stat. 329; Act of May 27, 1908, 35 Stat. 312.

USC Section 177, state that Indian lands cannot be purchased without the approval of the United States government. These acts have been deemed applicable to Tribes holding their fee by patent. 9 Op.AG 24, 27 (1857).

The allotment acts of the Choctaw Nation[7] and the Cherokee Nation[8] state that the lands so alloted were to be non-transferrable. Conveyances of restricted lands must have the consent and approval of the Secretary of Interior[9]. The allotted land cannot be encumbered by any deed, debt or obligation[10]. Funds from the sale of restricted lands become in turn restricted, subject to the supervision and control of the Secretary of Interior[11]. Royalties from restricted lands are in turn restricted funds[12]. The leasing of the restricted lands of the Five Civilized Tribes is also subject to the approval of the Secretary of Interior[13]. Although the restricted lands of full

[7] Act of June 28, 1898, 30 Stat. 495, 505-13.

[8] Act of July 1, 1902, 32 Stat. 716.

[9] Act of July 2, 1945, 59 Stat. 313.

[10] Act of August 1, 1914, 38 Stat. 601, 25 USC Section 86.

[11] Act of March 3, 1911, 36 Stat. 1070, 25 USC Section 156.

[12] 25 USC 356; *House v. United States*, 144 F.2d 555 (Tenth Circuit 1934), Cert. Denied 323 US 781.

[13] Act of April 26, 1906, 34 Stat. 137, 144; Act of May 27, 1908, 35 Stat. 312, 313, Act of February 14, 1920, 41 Stat. 408, 25 USC 356; Act of February 11, 1936, 49 Stat. 1135, 25 USC 393(a); Act of August 4, 1947, 61 Stat. 731; 25 CFR 174; *House v. United States, supra; United States v. Haddock*, 21 F.2d 165 (Eighth Circuit 1927).

bloods are subject to partition according to the laws of Oklahoma, the same retain their restrictions on alienation[14]. Congress also remains in control of the determination of heirship to the lands of deceased allottees of the restricted lands[15]. Finally, the United States government has the sole authority to remove any restrictions on the land of the Five Civilized Tribes[16].

The Restricted Lands of the Cherokees and Choctaws Are Not Taxable

Just as the reservations of Tribes holding their land in trust are not taxable, so are the lands of the Choctaw and Cherokee Nations. The non-taxability of their lands is clear from statute[17] and from case law[18].

Summary

The petitioners would have us believe that the fee title which was given by treaty with the Choctaw and Cherokee Nations was a classical fee simple absolute, unencumbered by any restraints. As we have seen, restraints and restrictions on the "fee" of the Choctaw and Cherokee lands were many and they were significant. It might be said that when the totality of the restraints are weighed, no real difference between the restraints that exist on trust lands and the restraints on Choctaw and Cherokee lands exists.

[14] Act of June 14, 1918, 40 Stat. 606, 25 USC 355.

[15] Act of June 14, 1918, 40 Stat. 606, 25 USC 375, 375 (a)-(d).

[16] 25 CFR 121.12 et. seq.

[17] Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716; Act of April 26, 1906, 34 Stat. 137; Act of May 27, 1908, 35 Stat. 312.

[18] *Choate v. Trapp*, 224 US 665 (1912); *United States v. Board of Commissioners of McIntosh County, Oklahoma*, 154 F.2d 600 (Tenth Circuit, 1946).

IV

Amicus Brief of the State of Washington

Because the amicus Tribe, the Spokane Tribe of Indians, has its reservation within the boundaries of the State of Washington, the Tribe wishes to comment on the arguments of the Washington State Attorney General in the Amicus Brief of Washington.

Washington begins its discussion with a misunderstanding of the degree of title received by the State to the beds of the navigable waters. It compounds this misunderstanding by expressing a similar misunderstanding of the degree, nature and extent of title to the same river beds when held for the Tribes.

When a state receives title to the bed of navigable waters under the equal footing doctrine, it is settled law that the title it receives is subject to the navigational servitude reserved in the United States for the benefit of the entire nation. *United States v. Virginia E. & P. Co.*, 365 US 624 (1961); *United States v. Willow River Power Company*, 324 US 499 (1945); *United States v. Commodore Park*, 324 US 386 (1945).

Similarly, when a Tribe reserves or is granted a reservation which includes that of a navigable body of water, that title is subject also to the same navigational servitude. *United States v. Grand River Dam Authority*, 363 US 229 (1960). Washington ignores this converse concept.

Washington Brief Confuses Indian Title With Indian Rights

The Washington brief is classic in its confusion of Indian rights with Indian title. Washington argues that, because the Crow treaty reserved to the Tribe the right of "absolute and undisturbed use and occupation" of the reservation lands with the power to exclude from them non-members, the Tribe, if it owned the bed of the river,

would have had the right to absolutely exclude the public from use of the river for navigation. This is not correct as aforesaid. The Tribe holds its title to the river bed subject to the same servitude that Montana does to navigable river beds outside the Reservation. The public has the same rights to the use of the river for navigation whether owned by the Tribe or the State.

As is evident from the cases cited by all parties, there are innumerable examples of the bifurcation of Indian title and Indian rights. Pages could be filled with citations of cases and law holding that Indians have hunting and fishing rights at usual and accustomed places that have nothing to do with title. *United States v. Washington,* 384 F.Supp. 312 (W.D. Washington 1974), Aff. 520 F.2d 676 (Ninth Circuit 1975); *Puyallup Tribe v. Washington Department of Game,* 433 US 165 (1977); *Washington Department of Game v. Puyallup Tribe,* 414 US 44 (1973); *Puyallup Tribe v. Department of Game of Washington,* 391 US 392 (1968). Tribes have prior and paramount (Winter's) rights to water for irrigation and other beneficial uses that are in no way dependent on the Tribes having an ownership interest in the source of the water. We have a whole body of law regarding the retained rights of Tribes and their members to hunt, fish, gather roots, etc., on lands off the Reservation. *Seufert Brothers Co. v. United States,* 249 US 194 (1919); *United States v. Winans,* 198 US 371 (1905); *Tulee v. Washington,* 315 US 681 (1942). In this body of law it was established that the off Reservation non-Indian lands are often held subject to these Indian rights. The Tribes have no title at all.

Conversely an equal number of cases and law can be listed in which Tribal and individual Indian title is subject to many qualifications and restrictions. The modern reservation is laced with highways, roads, railroads, transmission lines, pipelines, and other arteries and

sinews of commerce so that the average citizen is not even aware that he is passing, in his individual travel and commerce, through an Indian reservation.

The Indian lands themselves are checkerboarded with non-Indian lands and fractionated into shared titles in which Tribes, individual Indians and non-Indians share interests in various tracts. In modern law the jurisdictional and title patterns of Indian Reservations and lands have experienced the same legal evolution to accommodate public and private rights, especially of passage and commerce, as have other public and private lands.

It is interesting that Washington does not cite one of its own landmark cases, that of *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). This case had to do with the bed of Chelan Lake, a navigable body of water, on which, because of a power dam, the water was annually raised approximately 20 vertical feet above the normal high water mark so that the private abutting land was seasonally overflowed and exposed by the seasonal fill ups and draw downs. The question was whether the public rights to navigation and use of the surface of the water ebbed and flowed with the water, expanding over the private lands at high water, so that the owner of the underlying private land could or could not fill and use it in such a way to prevent this public use. The court held with the public saying:

> ". . . we hold that when the level of Lake Chelan is raised to the 1,100 foot mark (or such level as submerges the defendant's land), that land is subject to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. . . . When the level of the lake is lowered so that the defendant's land is no

longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged . . ."

Id., at 316.

Thus we have an outstanding example of the non-coincidence of title and right.

An excellent example of this bifurcation of title and right and the intrusion of public rights to navigation onto an Indian reservation is the legal pattern and use of Roosevelt Lake behind Grand Coulee Dam. On the Colville and Spokane Reservation sides of the resulting lake, the federal government took to elevation 1310 above sea level the top 20 feet of which is freeboard land. The question of the retained title and rights of the Tribes to the lake surface and beds has been treated in two opinions by the Solicitor. 59 I.D. 147 (1945); 84 I.D. 72 (1974). Both opinions hold that whereas the Tribes still own or hold title to the submerged beds and banks of the Columbia and Spokane Rivers, that title was and is subject to the navigational servitude of the United States. The 1974 opinion holds that the Tribe has exclusive hunting and fishing rights to the freeboard areas and approximately one-half of the lake surface bordering their Reservations.

The United States in this project recognizes the Tribal title to the bed and banks of the submerged rivers (a situation not unlike that of the bed and banks of the Big Horn within the Crow Reservation) but acknowledges very few rights of the Tribes growing out of that title. Act of June 29, 1940, 54 Stat. 703, 16 USC Sec. 835d. On the other hand, without title to the freeboard and water surface bordering their Reservations, it recognizes exclusive Tribal rights for hunting and fishing.

It was in *Choctaw Nation v. Oklahoma*, 397 US 620 (1970), that whereas the state presumed to be able to

be able to lease the bed of the Arkansas River for oil drilling, subject to the navigational servitude, the Supreme Court held that title was not in the state, but was in the Tribes, also subject to navigational servitude. The Ninth Circuit in *United States v. Finch*, recognized and reasserted the navigational servitude of the Big Horn River.

> "We thus conclude that the United States, by citing the Treaty of 1868 with the Crows, intended to grant them dominion and control over that portion of the bed of the Big Horn River situated within the Reservation, (Cites Omitted), *subject to the retained power of the United States to exercise its paramount right to control navigation on the river.*" (Emphasis Ours)

United States v. Finch, 548 F.2d 822, 831 (Ninth Circuit 1976).

Tribal Ownership of the Bed of the River is Consistent With Non-Ownership of Adjacent Lands

Again Washington, in an excess of legal reasoning, states on page 13 of its Brief that even if the Tribe had the beneficial title to the bed at the time of statehood, that title passed into state ownership as adjacent landowners alienated to non-Indians.

The *Choctaw* case, *supra*, teaches just the opposite, with the Tribes retaining title to the riverbed even though they have long since lost title to the riparian lands.

Conclusion

We hope that the Supreme Court will hold firm against this last assault by the states against the long established and legally recognized ownership rights of the Tribes to the beds of navigable waters. This Court should not break the precedent of the many cases cited above. An opposite decision would result in a nightmare of litigation and re-litigation as Tribal ownership rights to navigable

beds would be challenged on every Reservation that has them.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,
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